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87-228

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALUMINA PARTNERS OF JAMAICA,
Petitioner,

v.

CABLE BELT CONVEYORS, INC.,
AND
PAUL N. HOWARD COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether, as the Second Circuit holds, courts enforcing arbitration agreements under the Federal Arbitration Act may order parties with no contractual relationship to arbitrate in a consolidated proceeding in order to promote efficient dispute-resolution, or whether, as the Fifth and Ninth Circuits hold, courts may not order consolidation in the absence of the parties' consent because the Act only allows the courts to enforce the terms of arbitration agreements as they are written.

PARTIES TO THE PROCEEDING

Petitioner is Alumina Partners of Jamaica, a Delaware partnership consisting of Kaiser Jamaica Corporation, Reynolds Metals Company, and Alpart Jamaica, Inc. (formerly known as Anaconda Jamaica, Inc.).

Respondents are Cable Belt Conveyors, Inc., a Delaware corporation, and Paul N. Howard Company, a North Carolina corporation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	18

TABLE OF AUTHORITIES

CASES: Page

Balfour, Guthrie & Co. v. *Commercial Metals Co.*, 93 Wash. 2d 199, 607 P.2d 856 (1980) 17

Bay County Building Authority v. *Spence Brothers*, 140 Mich. App. 182, 362 N.W.2d 739 (1984) 17

Bernhardt v. *Polygraphic Company of America*, 350 U.S. 198 (1956) 15

Board of Educ. v. *Midwest Electric Co.*, 1 Ohio App. 3d 37, 439 N.E.2d 425 (1980) 17

Chas. Wolff Packing Co. v. *Court of Industrial Relations of State of Kansas*, 262 U.S. 522 (1923) 15

C. Itoh & Co. v. *Jordan International Co.*, 552 F.2d 1228 (7th Cir. 1977) 13

Compania Espanola de Petroleos, S.A. v. *Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976) ..... *passim*

Conoco Shipping Co. v. *Norse Shipping Co. (PTE)*, 1983 A.M.C. 1146 (S.D.N.Y. 1983) 8

Consolidated Pac. Eng'r, Inc. v. *Greater Anchorage Area Borough*, 563 P.2d 252 (Alaska 1977) 17

County of Sullivan v. *Edward L. Nezelek, Inc.*, 42 N.Y.2d 123, 366 N.E.2d 72 (1977) 16

Dean Witter Reynolds Inc. v. *Byrd*, 470 U.S. 213 (1985) 13

Del E. Webb Construction v. *Richardson Hospital Authority*, No. 86-1570 (5th Cir. decided August 3, 1987) 9, 12

Dorchy v. *State of Kansas*, 264 U.S. 286 (1926) 15

Episcopal Housing Corp. v. *Federal Insurance Co.*, 273 S.C. 181, 255 S.E.2d 451 (1979) 16

Exber, Inc. v. *Sletten Construction Co.*, 92 Nev. 721, 558 P.2d 517 (1976) 16

Garden Grove Community Church of Reformed Church in America v. *Pittsburgh-Des Moines Steel Co.*, 191 Cal. Rptr. 15, 140 Cal. App. 3d 251 (1983) 17

Gavlik Construction Co. v. *H.F. Campbell Co.*, 526 F.2d 777 (3d Cir. 1975) 5, 7

Grover-Dimond Associates v. *American Arbitration Association*, 297 Minn. 324, 211 N.W.2d 787 (1973) 16

Higley South, Inc. v. *Park Shore Development Co.*, 494 So.2d 227 (Fla. Dist. Ct. App. 1986) 6, 16

Table of Authorities Continued

Page

Hjelle v. *Sornsin Constr. Co.*, 173 N.W.2d 431 (N.D. 1969)..... 17

In re Arbitration Between Reefer Express Lines Pty., Ltd and Mediteranska Plovibda, No. 86 Civ. 4490 (MJL) (S.D.N.Y. May 28, 1987)..... 8

In re Vigo Steamship, 26 N.Y.2d 157, 257 N.E.2d 624, *cert. denied*, 400 U.S. 819 (1970)..... 16

In the Matter of Czarnikow-Rionda Co., 512 F.Supp. 1308 (S.D.N.Y. 1981) 8

Litton Bionetics, Inc. v. *Glen Construction Co.*, 292 Md. 34, 437 A.2d 208 (1981)..... 16, 17

Louisiana Stadium and Exposition District v. *Huber, Hunt & Nichols, Inc.*, 349 So.2d 491 (La. App. 1977) 17

Maxum Foundations, Inc. v. *Salus Corp.*, No. 86-3056 (4th Cir. decided March 4, 1987)..... 5, 7

Mitsubishi Motors Corp. v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985)..... 14

Moses H. Cone Memorial Hospital v. *Mercury Construction Corp.*, 460 U.S. 1 (1983)..... 12, 13

Ore & Chemical Corp. v. *Stinnes Interoil, Inc.*, 606 F.Supp. 1510 (S.D.N.Y. 1985)..... 8, 14

Perry v. *Thomas*, 55 U.S.L.W. 4832 (1987)..... 13

Prima Paint Corp. v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)..... 15

Pueblo of Laguana v. *Cillesen & Sons, Inc.*, 101 N.M. 341, 682 P.2d 197 (1984)..... 17

Republic Steel Corp. v. *Maddox*, 379 U.S. 650 (1965)... 15

Scherk v. *Alberto-Culver Co.*, 417 U.S. 506 (1976)..... 9, 14

Shearson/American Express, Inc. v. *McMahon*, 55 U.S.L.W. 4757 (1987) 14

Sociedad Anonima de Navegacion Petrolera v. *Cia. de Petroleos de Chile, S.A.*, 634 F.Supp. 805 (S.D.N.Y. 1986)..... 8, 14

Southland Corp. v. *Keating*, 465 U.S. 1 (1984).. 5, 11, 12, 17

Stop & Shop Cos. v. *Gilbane Bldg. Co.*, 364 Mass. 325, 304 N.E.2d 429 (1973)..... 17

Weyerhaeuser Co. v. *Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir. 1984), *cert. denied*, 469 U.S. 1061 (1985)..... 9, 12

Table of Authorities Continued

	Page
Wm. C. Blanchard Co. v. *Beach Concrete Co.*, 121 N.J. Super. 418, 297 A.2d 587 (1972)	17
W.J. Megin, Inc. v. *State*, 181 Conn. 47, 434 A.2d 306 (1980)	17
STATUTES:	
9 U.S.C. § 2	2
9 U.S.C. § 4	2, 4, 9, 10
9 U.S.C. § 203	4
28 U.S.C. § 1254(1)	2
California Code of Civil Procedure § 1281.3	16
LEGISLATIVE HISTORY:	
Joint Hearings Before the Subcommittees on the Judiciary on S. 1005 and H.R. 646, 68th Cong., 1st Sess. (Jan. 9, 1924)	15
MISCELLANEOUS:	
American Arbitration Ass'n, *Resolving Your Disputes* (Nov. 1986)	7
Annot., *Constitutionality of Arbitration Statutes*, 55 A.L.R.2d 432 (1957)	15
Annot., *State Court's Power to Consolidate Arbitration Proceedings*, 63 A.L.R.3d 528 (1975)	17
Arbitration Grows As Trial Alternative, N.Y. Times, July 5, 1987, Section 11 WC, at 2, col. 3	7
Fed. R. Civ. P. 81(a)(3)	14
H.S. Miller, *Consolidated Arbitrations in New York Maritime Disputes*, Int'l Bus. Lawyer 58 (March 1986)	7
4 Wright & Miller, *Federal Practice Procedure: Civil*, *§ 1075* (1969)	14

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OPINIONS BELOW

The order of the court of appeals (App. 3a) is unreported. The opinion of the district court (App. 6a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1987. (App. 3a.) On July 1, 1987, the court of appeals denied a timely petition for rehearing. (App. 5a.) On July 29, 1987, the court of appeals granted a motion to recall the mandate and stay its re-issuance pending the

filing of this petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Sections 2 and 4 of the Federal Arbitration Act, 9 U.S.C. §§ 2 and 4, are reprinted in full in the appendix.

Section 2 (9 U.S.C. § 2) provides, in pertinent part, that

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 4 (9 U.S.C. § 4) provides, in pertinent part, as follows:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction . . . in a civil action . . . of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in a manner provided for in such agreement . . .. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

STATEMENT OF THE CASE

In 1981, petitioner Alumina Partners of Jamaica ("Alumina") and a general contractor (respondent Cable Belt Conveyors, Inc.) entered into a contract for the construction of a nine-mile long conveyor belt at one of

Alumina's facilities in Jamaica, West Indies. (App. 7a.) The general contractor in this "turnkey" project undertook complete responsibility for construction of the conveyor belt system.

In the contract between Alumina and the general contractor, the parties explicitly agreed that they were not creating any contractual relationship between Alumina and any subcontractor retained by the general contractor.[1] The contract also provided that any disputes between Alumina and the general contractor would be submitted to arbitration in accordance with the rules of the American Arbitration Association.

Later, the general contractor entered into a subcontract with respondent Paul N. Howard Company without first disclosing its terms to Alumina. The subcontract contained a provision requiring arbitration of disputes between the general contractor and the subcontractor, also in accordance with the rules of the American Arbitration Association. (App. 8a.)

In 1985, the subcontractor demanded arbitration with the general contractor, claiming that it was owed $33 million plus $12 million in interest for costs incurred in performing the subcontract. In 1986, after denying liability to its subcontractor, the general contractor demanded arbitration with Alumina for whatever it might be required to pay in the earlier arbitration and for a

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[1] Article 14.D of the contract provides:

> Nothing contained herein in the contract or any subcontract shall create any contractual relationship between [Alumina] and any Subcontractor or vendor or create any obligation on the part of [Alumina] to pay or to see to the payment of any sums to any Subcontractor or vendor.

Joint Appendix filed with Court of Appeals, at A255.

separate claim against Alumina. (App. 8a.) The general contractor and the subcontractor then brought an action against Alumina in federal district court, pursuant to 9 U.S.C. § 4,[2] seeking to compel the two arbitrations to be consolidated into one. The general contractor and the subcontractor, in seeking consolidation, were not purporting to enforce any contract terms. Alumina's contract with the general contractor did not provide for the consolidation of arbitration proceedings. In addition, the American Arbitration Association (whose rules were to control the two arbitration proceedings) had expressly determined that it could not require such consolidation without the consent of all the parties or a court order.[3]

The district court ordered consolidation on March 5, 1987, relying on the Second Circuit's decision in *Compania Espanola de Petroleos, S.A.* v. *Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976).[4] The district court held that consolidation is "proper where there are common questions of law or fact and a possibility of conflicting awards or inconsistent results." (App. 9a.) The court of appeals affirmed on May 20, 1987, for "substantially" the reasons set forth in the district court's opinion (App. 4a), and denied Alumina's petition for rehearing on July 1, 1987. (App. 5a.)

REASONS FOR GRANTING THE WRIT

This case presents an important and recurring question of federal law on which the courts of appeals are in con-

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[2] The jurisdiction of the district court rested on 9 U.S.C. §§ 4 and 203.

[3] Joint Appendix filed with Court of Appeals, at A238.

[4] In *Nereus*, the Second Circuit held that "the liberal purposes of the Federal Arbitration Act clearly require that this act be interpreted so as to permit and even to encourage the consolidation of arbitration proceedings in proper cases . . .." 527 F.2d at 975.

flict. Whether the Federal Arbitration Act empowers a court "to order consolidation of arbitration proceedings where the parties have not agreed to do so," the Fourth Circuit recently observed, "is uncertain" in light of the split in the circuits. *Maxum Foundations, Inc.* v. *Salus Corp.*, No. 86-3056, slip op. at 4 (4th Cir. decided March 4, 1987).[5] The Fifth and Ninth Circuits have held that court-ordered consolidation is not permitted under the Act, while the Second Circuit has held the opposite. This Court identified the issue in *Southland Corp.* v. *Keating*, 465 U.S. 1, 9 n.4 (1984), but did not decide it because of the jurisdictional posture of the case.[6]

At least sixteen state courts have considered whether parties to separate contracts can be forced to arbitrate with each other in a combined proceeding; six have ruled that consolidation can be ordered while the other ten have decided the opposite. Although these state courts generally framed the issue in terms of state law, *Southland* now makes clear that the Federal Arbitration Act creates a body of federal substantive law governing cases involving interstate commerce that is "applicable in state as well as

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[5] The Fourth Circuit in *Maxum* found it unnecessary to decide the question because the arbitration agreements, as the court interpreted them, authorized consolidation. The Third Circuit followed a similar course in *Gavlik Construction Co.* v. *H.F. Campbell Co.*, 526 F.2d 777 (3d Cir. 1975) (applying Pennsylvania law).

[6] In *Southland*, the California Supreme Court had relied on the Second Circuit's *Nereus* decision in imposing a class action structure on arbitration proceedings, reasoning that *Nereus* provided "'[a]nalogous authority' supporting consolidation of arbitration proceedings." 465 U.S. at 9 n.4. However, since the validity of such a structure under federal law was neither raised nor decided in the state court proceedings, this Court held that it did not have jurisdiction to consider the matter.

federal courts." 465 U.S. at 16. When the state courts look to federal law on this subject, however, they confront not a uniform interpretation of the Act, but an irreconcilable difference of opinion between three federal courts of appeals where much of the nation's commercial litigation is concentrated, the Second, Fifth, and Ninth Circuits.[7]

Whether courts are empowered to order consolidation under the Federal Arbitration Act should not turn on the federal circuit where enforcement of the contracts is sought, nor should the outcome depend on the choice of a federal or state forum. Review by this Court is, we submit, warranted in order to bring about the uniformity of federal arbitration law that *Southland* required, particularly since the judgment below is also inconsistent with recent decisions of this Court under the Act, as we later discuss.

With not only the circuits but also the district judges within the Second Circuit[8] divided in their views about the effect of this Court's rulings on the question presented here, the court of appeals' summary affirmance in this case reflects a breakdown in the reviewing function of a federal appellate court. When a federal court of appeals sets itself squarely at odds with another court of appeals in the face of intervening Supreme Court decisions, it has a duty to explain itself. When it forsakes that duty, corrective action through the certiorari process is necessary.

A.

The last decade has witnessed an enormous increase in commercial arbitration. The American Arbitration Asso-

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[7] *See, e.g., Higley South, Inc.* v. *Park Shore Development Co.*, 494 So. 2d 227 (Fla. Dist. Ct. App. 1986) (noting the "dynamic state of conflict" in the federal courts on the consolidation issue).

[8] *See* pp. 8-9, *infra*.

ciation's commercial arbitration caseload has more than doubled during this period.[9] The issue presented in this case is one that is frequently encountered. The question arises, for example, in connection with construction projects when disputes occur between the owner and the general contractor and between the general contractor and subcontractors.[10] The question is also common in the maritime industry where, for example, the owner charters its vessel to a person who then enters into a subcharter agreement.[11] The contracts between the various parties are separate but each provides for arbitration. When separate arbitration proceedings are sought involving potentially over-lapping factual and legal issues, one or more of the parties may seek to consolidate the arbitrations although the agreements expressly provide for independent proceedings between only the parties to each contract.

Twelve years ago, the court below held that "the case law" supported "the propriety of a court's consolidation of arbitration under the federal [arbitration] statute." *Compania Espanola de Petroleos, S.A.* v. *Nereus Shipping*,

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[9] From 1975 to 1985, the American Arbitration Association's caseload of commercial arbitrations rose from 4,128 to 9,062 cases. American Arbitration Ass'n, *Resolving Your Disputes* 10 (Nov. 1986). Approximately 47,000 cases of all types, involving $700 million in claims and counterclaims, were filed with the Association in 1986, and more than 400 groups now offer arbitration services. *Arbitration Grows As Trial Alternative*, N.Y. Times, July 5, 1987, Section 11 WC, at 2, col. 3.

[10] *See, e.g., Maxum Foundations, supra; Gavlik, supra.*

[11] *See* H.S. Miller, *Consolidated Arbitrations in New York Maritime Disputes*, Int'l Bus. Lawyer 58, 61 (March 1986) (citing numerous consolidated arbitration proceedings involving maritime disputes in New York, where *Nereus* controls).

S.A., 527 F.2d 966, 975 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976).[12] The district court in this case based its decision on *Nereus* and, by its affirmance, the court of appeals did as well. *Nereus* ultimately rested on the rationale, stressed by the district court here (App. 9a), that the courts should promote "efficient" — that is, litigation-like — means of resolving disputes through arbitration regardless of the desires of the parties or the terms of the contracts. On this basis, the court in *Nereus* refused to "adhere to the terms of the original arbitration agreement." 527 F.2d at 975.

In the years since *Nereus*, however, the rationale of that decision has been severely undercut, so much so that prior to this case another district court in the Second Circuit concluded that *Nereus* would be overruled and therefore refused to consolidate arbitration proceedings. *Ore & Chemical Corp.* v. *Stinnes Interoil, Inc.*, 606 F. Supp. 1510, 1513 (S.D.N.Y. 1985).[13] Even after the decision below, still another district court in the Second Circuit concluded that it was uncertain whether the Federal Arbitration Act empowered courts to order consolidation of arbitration proceedings. *In re Arbitration Between Reefer Express Lines Pty., Ltd. and Mediteranska Plovibda*, No. 86 Civ. 4490 (MJL) (S.D.N.Y. May 28, 1987) (noting the "serious question in this circuit" con-

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[12] In support of its view of the "case law," the court in *Nereus* cited three district court decisions. 527 F.2d at 975.

[13] Prior to the judgment below, the district courts within the Second Circuit were split. *See Sociedad Anonima de Navegacion Petrolera* v. *Cia. de Petroleos de Chile, S.A.*, 634 F. Supp. 805 (S.D.N.Y. 1986); *In the Matter of Czarnikow-Rionda Co.*, 512 F. Supp. 1308 (S.D.N.Y. 1981); and *Conoco Shipping Co.* v. *Norse Shipping Co. (PTE)*, 1983 A.M.C. 1146 (S.D.N.Y. 1983), ordering separate arbitrations consolidated.

cerning the courts' power to order consolidated arbitration).

In *Weyerhaeuser Co.* v. *Western Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984), *cert. denied*, 469 U.S. 1061 (1985), the Ninth Circuit carefully analyzed the Second Circuit's decision in *Nereus* and rejected it. The Ninth Circuit held that the Federal Arbitration Act provided no authority to courts to engraft litigation procedures on arbitrations in the absence of the agreement of the parties. Section 4 of the Act empowers courts to enforce agreements to arbitrate "by directing the parties to proceed with the arbitration in accordance with the terms thereof." 9 U.S.C. § 4. Section 4 has as its "'underlying premise that arbitration is a creature of contract,'" and the Act thus authorizes a court only to order that arbitration proceed under the terms of the parties' arbitration agreement. 743 F.2d at 637 (quoting the district court in *Weyerhaeuser*). Relying on this Court's decision in *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1976), the Ninth Circuit concluded that courts cannot add or alter contractual arbitration procedures because "an agreement to arbitrate before a special tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." 743 F.2d at 637 (quoting *Scherk* v. *Alberto-Culver Co.*, 417 U.S. at 519). Thus, "[i]nsofar as [the Second Circuit in *Nereus*] holds that federal courts may order consolidation in the absence of consent" the Ninth Circuit in *Weyerhaeuser* "decline[d] to follow it." 743 F.2d at 637.

Recently, the Fifth Circuit reviewed the divergent views of the Second and Ninth Circuits on the consolidation issue and decided to follow the Ninth Circuit's decision in *Weyerhaeuser*. The court stated in *Del E. Webb*

Construction v. *Richardson Hospital Authority,* No. 86-1570 (5th Cir. decided August 3, 1987): "we agree with the Ninth Circuit that under § 4 of the Federal Arbitration Act the sole question for the district court is whether there is a written agreement among the parties providing for consolidated arbitration." Consolidation cannot be ordered, the court held, "since under the grant of authority in § 4 the district court was limited to enforcing arbitration agreements according to their terms."

B.

The recent opinions of this Court show that the Fifth and Ninth Circuits' interpretation of the Federal Arbitration Act is correct and that the courts below erred in continuing to adhere to *Nereus*. In this case, Alumina's arbitration agreement with the general contractor did not provide that an arbitration between the general contractor and the subcontractor could be merged into an arbitration between Alumina and the general contractor. To the contrary, the district court's consolidation order directly contravened Alumina's agreement to arbitrate in accordance with the rules of the American Arbitration Association. Those rules do not allow consolidation and here the Association declined to order consolidation without Alumina's consent, which it refused to give for good reason.[14]

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[14] As this case illustrates, the time and expense that a party may be required to devote to a consolidated arbitration proceeding may far exceed what it contemplated in the contract when it agreed to a separate proceeding. If Alumina were to arbitrate against only its general contractor, Alumina would be required to establish only that it is not liable for whatever amounts — if any — the subcontractor were awarded against the general contractor in their arbitration. If no award were entered in favor of the subcontractor in the separate arbitration, Alumina would not have to defend against any of the

In litigation, the advantage one party perceives in separate judicial proceedings would perhaps be insufficient to overcome considerations of judicial efficiency. In arbitration, however, there are other, overriding concerns. An agreement to arbitrate disputes arising under a contract reflects, like the rest of the contract, the give and take of negotiation and each party's calculation of the most favorable terms it can insist upon in light of its bargaining position. The judicial imposition of litigation procedures (such as consolidation) onto arbitration proceedings could also hamper the tremendous growth of arbitration (*see* note 9, *supra*), as parties grow wary of the hidden or uncertain implications of an agreement to arbitrate disputes.[15]

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general contractor's derivative claims.

On the other hand, in a consolidated arbitration proceeding Alumina would be required to defend against all of the subcontractor's claims against the general contractor, despite the fact that Alumina had no contractual relationship with the subcontractor. Such a consolidated arbitration necessarily transfers much of the onus of the initial defense from the general contractor to Alumina and gives rise to a complex multi-party proceeding the contracts neither authorized nor contemplated. In light of the magnitude of the subcontractor's claims ($33 million plus $12 million in interest) and the fact-intensive nature of damage claims in construction disputes such as this, the burden Alumina would have to shoulder in a consolidated proceeding is markedly greater than if, as the contract provided, it engaged in arbitration with the general contractor alone.

[15] If the decisions below are not reversed, there will be no limit within the Second Circuit upon the courts' interjection of all types of judicially-developed procedures into arbitration proceedings, including class-action and other procedures developed for complex litigation. This concern is not speculative. In *Southland Corp.* v. *Keating*, *supra*, for example, the Court was asked to consider "the propriety of superimposing class-action procedures on a contract arbitration," but determined that it was not appropriate to decide the issue. *See* note 6,

Nevertheless, *Nereus* holds that under federal arbitration law courts can nullify the parties' negotiated agreements in the interest of judicial notions of efficiency. That rationale, rejected by the Ninth Circuit in *Weyerhaeuser* and the Fifth Circuit in *Del E. Webb*, is squarely at odds with decisions of this Court rendered after *Nereus* regarding the role of the courts in enforcing the Federal Arbitration Act.

The duty and authority of courts under the Act is to enforce the terms of contracts as they are written and as the parties have negotiated them. A court, whether federal or state, has no authority to change those terms or to fasten litigation procedures to the provisions of the contract, regardless of whether this would, in the court's view, promote efficiency or avoid what might be considered piecemeal proceedings. This Court so held in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983), a decision the district court in this case — and thus the court of appeals — failed to consider. The "misfortune" of separate proceedings, the Court ruled, "occurs because the relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement." 460 U.S. at 20 (emphasis in original) (footnote omitted). The Court added: "Under the Arbitration Act, an arbitration agreement must be enforced notwithstanding the presence of

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supra. In the lower court proceedings in *Keating*, the Second Circuit's consolidation decision in *Nereus* was cited by the California Supreme Court as a precedent supporting the courts' authority to impose class-action procedures in arbitration proceedings. 465 U.S. at 9 n.4.

other persons who are parties to the underlying dispute but not to the arbitration agreement." 460 U.S. at 20.[16]

The Court stressed these principles again in *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213 (1985). It is true, as the district court in this case stated, that *Byrd* did not determine whether courts had authority to consolidate arbitrations when the parties had not so provided by contract. (App. 12a.) But that is scarcely the end of the matter. The Court in *Byrd* flatly rejected the premise of *Nereus* that "the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims." 470 U.S. at 219. Contrary to *Nereus* and its view of the "liberal purpose of the Federal Arbitration Act" (527 F.2d at 975), *Byrd* holds that the Act must be interpreted to fulfill its "principal objective" of enforcing the "agreements into which the parties had entered." 470 U.S. at 220. If protecting the "contractual rights of the parties" also has the effect of promoting efficient dispute resolution, that is well and good, but such efficiency is not "the liberal purpose," or indeed any purpose of the Act as *Nereus* assumed. 470 U.S. at 220-21.

Since the decisions in *Moses H. Cone* and *Byrd*, the Court has continued to emphasize the Act's requirement that arbitration agreements be "rigorously enforced" according to their terms. *Perry* v. *Thomas*, 55 U.S.L.W. 4832, 4834 (1987) (holding that federal law preempts state labor statute that would have nullified arbitration agree-

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[16] As the Seventh Circuit held in a case the Court cited with approval (460 U.S. at 20 n.23), "[c]onsiderations of judicial economy bear no relation to 'the making and performance of an agreement to arbitrate . . ..'" *C. Itoh & Co.* v. *Jordan International Co.*, 552 F.2d 1228, 1231 (7th Cir. 1977).

ment); *Shearson/American Express, Inc.* v. *McMahon*, 55 U.S.L.W. 4757, 4758 (1987) (upholding arbitrability of claims under Section 10(b) of the Securities Exchange Act of 1934); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (sustaining arbitrability of antitrust claims in international commercial transactions). None of these decisions authorize courts to alter the arbitration terms agreed to by the parties once a dispute has been dispatched from the courts to an arbitral forum.[17] To the contrary, in *Mitsubishi* the Court reaffirmed the holding in *Scherk* that an arbitration agreement "'posits . . . the procedure to be used in resolving the dispute.'" 473 U.S. at 630. The court below failed to follow these principles in this case — or even to address them in a serious manner.[18]

This case also has an important constitutional dimension. When a party has agreed to submit to a consolidated arbitration proceeding before a dispute arises, that party

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[17] The courts may not, as the district court below supposed (App. 11a-12a), inject judicial procedures relating to consolidation into arbitration proceedings on the basis of Rule 81(a)(3), Fed. R. Civ. P. That Rule states that "proceedings" under the Federal Arbitration Act shall be governed by the Federal Rules of Civil Procedure "only to the extent that matters of procedure are not provided for" in that Act. However, "[i]t is only the *judicial* proceedings under the Arbitration Act . . . that are subject to the rules," and "[t]he federal rules do not govern the procedure in the hearings before the arbitrators." 4 Wright and Miller, *Federal Practice and Procedure: Civil § 1075*, at 81 (1969) (emphasis added). *Cf. Ore and Chemical Corp., supra*, 606 F. Supp. at 1515 (holding that Rule 81(a)(3) does not justify consolidation).

[18] The full extent of the analysis of this Court's decisions in the courts below was the district court's quotation of *Sociedad Anonima de Navegacion Petrolera, supra*, 634 F. Supp. at 809, which stated merely that the "*Byrd* decision never considered whether a district court can compel consolidation." (App. 11a.)

validly waives its constitutional rights to a jury trial under the Seventh Amendment and to procedural due process under the Due Process Clause. But where there is no such consent, as in this case, a consolidation order forces a party to defend or prosecute a claim in a setting to which it has never agreed and which does not offer those constitutional protections or indeed any meaningful judicial supervision.[19] Such a curtailment of constitutional rights — which is not contemplated under the Federal Arbitration Act in the first instance[20]—must be based on firmer grounds than the non-statutory "efficiency" considerations relied on by the courts below.[21]

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[19] As the Court observed in *Bernhardt* v. *Polygraphic Company of America*, 350 U.S. 198, 203 (1956):

> Arbitration carries no right to trial by jury that is guaranteed . . . by the Seventh Amendment. . . . Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial.

[20] The legislative history of the Federal Arbitration Act indicates that Congress intended to safeguard the Seventh Amendment right to a jury trial by requiring a party to submit to arbitration only when it had previously agreed to do so. *See Joint Hearings Before the Subcommittees on the Judiciary on S. 1005 and H.R. 646*, 68th Cong., 1st Sess. 17 (Jan. 9, 1924) (remarks of Mr. Cohen, American Bar Association's draftsman of the bill, assuring Congress that bill would not impair right to a jury trial); *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 413 (1967) (Black, J., dissenting). Indeed, the Court has held that certain types of compulsory arbitration violate the Due Process Clause of the Fourteenth Amendment. *Chas. Wolff Packing Co.* v. *Court of Industrial Relations of State of Kansas*, 262 U.S. 522 (1923) (arbitration of wage claims); *Dorchy* v. *State of Kansas*, 264 U.S. 286 (1926) (same). *See generally* Annot., *Constitutionality of Arbitration Statutes*, 55 A.L.R.2d 432, 440-42 (1957).

[21] As Justice Black stated in his dissent in *Republic Steel Corp.* v.

Finally, the importance of the issue presented here is all the more apparent in light of the uncertainty state courts face when called upon to determine whether consolidation can be ordered under the Federal Arbitration Act. One state court observed that the federal courts are in a "dynamic state of conflict" on the issue, *Higley South*, *supra*, 494 So.2d at 229, and at least three state courts have determined on varying grounds that consolidation may be required under the Act.[22] The state courts are also deeply split regarding whether consolidation should be permitted under state arbitration laws comparable to the Federal Arbitration Act. Six states have permitted court-ordered consolidation,[23] and ten have

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Maddox, 379 U.S. 650, 669-70 (1965):

> Even if it be true, which I do not concede, that Congress could force a man in this country to have his ordinary lawsuit adjudicated not under due process of law, i.e., without the constitutional safeguards of a court trial, I do not think that this court should ever feel free to infer or imply that Congress has taken such a step until the words of the statute are written so clearly that no one who reads them can doubt.

[22] *Litton Bionetics, Inc.* v. *Glen Construction Co.*, 292 Md. 34, 437 A.2d 208, 220 (1981); *Episcopal Housing Corp.* v. *Federal Insurance Co.*, 273 S.C. 181, 255 S.E.2d 451, 452 (1979); *In re Vigo Steamship*, 26 N.Y.2d 157, 257 N.E.2d 624, 626-27, *cert. denied*, 400 U.S. 819 (1970).

[23] These states are California (Calif. Code Civ. P. § 1281.3), Maryland, Minnesota, New York, Nevada, and South Carolina. *See, e.g.*, *Grover-Dimond Associates* v. *American Arbitration Association*, 297 Minn. 324, 211 N.W.2d 787 (1973) (in the interests of justice to resolve all issues in one proceeding); *County of Sullivan* v. *Edward L. Nezelek, Inc.*, 42 N.Y.2d 123, 366 N.E.2d 72 (1977) (court had authority to order consolidation); *Exber, Inc.* v. *Sletten Construction Co.*, 92 Nev. 721, 558 P.2d 517 (1976) (consolidation permissible when same evidence, legal issues, and witnesses involved); *Episcopal Housing Corp.*, *supra* (consolidation does not deny contracted right to arbitrate, only provides an expeditious method to enforce that

not.[24] As the state courts begin applying the Federal Arbitration Act in cases before them involving interstate commerce, which they must in light of this Court's decision in *Southland Corp.*, *supra*, the state courts will perpetuate their conflict, thus exacerbating the existing judicial disarray on the consolidation issue.

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right); *Litton Bionetics*, *supra*, 437 A.2d at 217; *Garden Grove Community Church of Reformed Church in America* v. *Pittsburgh-Des Moines Steel Co.*, 191 Cal. Rptr. 15, 140 Cal. App. 3d 251 (1983).

[24] These states are Alaska, Connecticut, Louisiana, Massachusetts, Michigan, New Jersey, New Mexico, North Dakota, Ohio, and Washington. *See, e.g.*, *W.J. Megin, Inc.* v. *State*, 181 Conn. 47, 434 A.2d 306 (1980) (arbitration is consensual); *Louisiana Stadium and Exposition District* v. *Huber, Hunt & Nichols, Inc.*, 349 So.2d 491 (La. App. 1977) (consolidation by a court has the effect of rewriting certain provisions of the contract); *Bay County Building Authority* v. *Spence Brothers*, 140 Mich. App. 182, 362 N.W.2d 739 (1984) (consolidation is a procedural question and therefore for an arbitrator to decide); *Pueblo of Laguana* v. *Cillesen & Sons, Inc.*, 101 N.M. 341, 682 P.2d 197 (1984) (court without power to consolidate under New Mexico Uniform Arbitration Act); *Balfour, Guthrie & Co.* v. *Commercial Metals Co.*, 93 Wash. 2d 199, 607 P.2d 856 (1980) (agreement to follow the rules of the American Arbitration Association, which has a policy of not approving consolidation without consent); *Stop & Shop Cos.* v. *Gilbane Bldg. Co.*, 364 Mass. 325, 304 N.E.2d 429 (1973) (result subsequently changed by statute); *Wm. C. Blanchard Co.* v. *Beach Concrete Co.*, 121 N.J. Super. 418, 297 A.2d 587 (1972); *Hjelle* v. *Sornsin Constr. Co.*, 173 N.W.2d 431 (N.D. 1969); *Board of Educ.* v. *Midwest Electric Co.*, 1 Ohio App. 3d 37, 439 N.E.2d 425, 427 (1980); *Consolidated Pac. Eng'r, Inc.* v. *Greater Anchorage Area Borough*, 563 P.2d 252 (Alaska 1977). *See generally* Annot., *State Court's Power to Consolidate Arbitration Proceedings*, 63 A.L.R.3d 528 (1975).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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August 1987

APPENDIX

APPENDIX

		Page
1.	Statutory Provisions Involved	1a
2.	Court of Appeals Opinion and Judgment, May 20, 1987	3a
3.	Court of Appeals Order Denying Petition for Rehearing, July 1, 1987	5a
4.	District Court Opinion, March 5, 1987	6a

STATUTORY PROVISIONS INVOLVED

1. 9 U.S.C. § 2 provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

2. 9 U.S.C. § 4 provides:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service hereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of

the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

(TJM)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Twentieth day of May, one thousand nine hundred and eighty-seven.

Present:

HONORABLE ELLSWORTH A. VAN GRAAFEILAND,
HONORABLE THOMAS J. MESKILL,
HONORABLE RICHARD J. CARDAMONE,

Circuit Judges.

Docket No. 87-7215

CABLE BELT CONVEYORS, INC., AND
PAUL N. HOWARD COMPANY,
Plaintiffs-Appellees,

v.

ALUMINA PARTNERS OF JAMAICA,
Defendant-Appellant.

UNITED STATES COURT OF APPEALS
FILED
MAY 20, 1987
ELAINE B. GOLDSMITH
CLERK
SECOND CIRCUIT

This is an appeal from the order of the United States District Court for the Southern District of New York, Conner, *J.*, consolidating arbitration involving Alumina Partners and its contractor Cable Belt Conveyors with arbitration between Cable Belt Conveyors and its subcontractor Paul N. Howard Co.

This cause came on to be heard on the transcript of record from said district court and was argued by counsel.

The order of the district court is AFFIRMED.

The order consolidating arbitration proceedings among the parties is affirmed, substantially for the reasons set forth in Judge Conner's opinion dated March 5, 1987.

/s/ Ellsworth A. Van Graafeiland, U.S.C.J.

/s/ Thomas J. Meskill, U.S.C.J.

/s/ Richard J. Cardamone, U.S.C.J.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 1st day of July one thousand nine hundred and eighty-seven.

Docket No. 87-7215

CABLE BELT CONVEYORS, INC., AND
PAUL N. HOWARD COMPANY,
Plaintiffs-Appellees,

v.

ALUMINA PARTNERS OF JAMAICA,
Defendant-Appellant.

UNITED STATES COURT OF APPEALS
FILED
JULY 1, 1987
ELAINE B. GOLDSMITH
CLERK
SECOND CIRCUIT

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellant ALUMINA PARTNERS OF JAMAICA

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

86 Civ. 7980 (WCC)

CABLE BELT CONVEYORS, INC., AND
PAUL N. HOWARD COMPANY,

Petitioners,

- against -

ALUMINA PARTNERS OF JAMAICA,

Respondent.

OPINION
AND ORDER

APPEARANCES:

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Petitioners Cable Belt Conveyors, Inc. ("Cable Belt") and Paul N. Howard Company, ("Paul Howard") have moved, pursuant to the Federal Arbitration Act, 9 U.S.C. §2 et. seq. (1982), Section 206 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and Rule 42(a) and 81(a)(3), Fed. R. Civ. P., for an order consolidating the arbitration proceedings now pending before the American Arbitration Association between Paul Howard and Cable Belt (AAA Case No. 13-110-0452-85) and between Cable Belt and Alumina Partners of Jamaica ("Alpart") (AAA Case No. 13-110-0113-86). Defendant has cross-moved for an order dismissing the petition on the grounds that: (1) this Court lacks the authority to order the consolidation of these arbitrations; (2) consolidation would be highly prejudicial to Alpart; (3) under applicable New York state law, any judicial application involving the arbitration between Alpart and Cable Belt must be made in New York Supreme Court since a special proceeding has been commenced there; and (4) collateral estoppel bars the petitioners from seeking this relief.

BACKGROUND

On March 31, 1981 Alpart and Cable Belt entered into a contract whereby Cable Belt agreed to supply and install a conveyor system to transport bauxite from Alpart's mine to a storage dome at Alpart's plant site in Manchester Plateau, Jamaica. The contract required Alpart's express consent to the subcontracting of any part of the contract work by Cable Belt and required that Cable Belt make the terms and conditions of the main contract (so far as they were applicable) the terms and conditions of any such subcontract. On April 9, 1982, Cable Belt entered into a subcontract with Paul Howard for the installation and commissioning of the conveyor system

described above, as well as certain related work. The subcontract contained an arbitration clause similar to that of the prime contract, though there is some dispute as to whether a partial copy of the subcontract sent by Cable Belt to Alpart included the provision relating to the arbitration of disputes which was contained in the subcontract.

As a result of costs allegedly incurred due to delays and disruptions in the subcontract work, Paul Howard demanded arbitration against Cable Belt before the American Arbitration Association in June 1985 for claims totalling approximately $33,000,000 plus $12,000,000 in interest costs. Cable Belt has denied liability to Paul Howard for its claims as stated but, in a separate demand for arbitration, has claimed over against Alpart for such portions of Paul Howard's claims which may be justified pursuant to the terms of the Subcontract which are found to be the responsibility of Alpart. On January 23, 1986 Cable Belt served this demand for arbitration on Alpart pursuant to the arbitration clause in the Contract. All of Cable Belt's claims against Alpart and all of Paul Howard's claims against Cable Belt relate to the installation of the conveyor system for Alpart in Jamaica. Further, resolution of both Paul Howard's claims against Cable Belt and Cable Belt's claims against Alpart requires a determination regarding the responsibility as between Alpart and Cable Belt under Section 35(d) of the Subcontract (the "pass-through" provision) for the cost of delays, extra expenses and disruptions of work on such project.

On February 10, 1986, Alpart moved by order to show cause in the Supreme Court of the State of New York to stay Cable Belt's arbitration against it on the ground that Cable Belt had failed to satisfy a condition precedent to arbitration. That motion was denied on April 4, 1986. On appeal, Paul Howard moved for leave to intervene in the state court proceeding on the ground that it had a right to participate in a consolidated arbitration. Alpart opposed that motion which was denied by the Appellate Division, First Department on August 14, 1986. On October 14, 1986, the Appellate Division, First Department unanimously affirmed the trial court's denial of Alpart's

motion to stay arbitration and ordered the arbitration to proceed. On December 16, 1986, that same court denied Alpart's motion for reargument or leave to appeal to the Court of Appeals.

DISCUSSION

The Court of Appeals for the Second Circuit has stated unequivocally that a federal court has the authority to compel the consolidation of arbitration proceedings. *See, e.g., Compania Espanola de Petroleos, S.A.* v. *Nereus Shipping, S.A.*, 527 F.2d 966 (2nd Cir. 1975), *cert. denied*, 426 U.S. 936 (1976); *See also Sociedad Anonima de Navegacion Petrolera* v. *CIA de Petroleos de Chile, S.A.*, No. 85 Civ. 7776 (GLG) (S.D.N.Y. May 7, 1986); *In Matter of Czarnikow-Rionda Co.*, 512 F.Supp. 1308 (S.D.N.Y. 1981); *Lavino Shipping Co.* v. *Santa Cecilia Co.*, 1972 A.M.C. 2454 (S.D.N.Y. 1972). The court in *Nereus* noted that "we think the liberal purposes of the Federal Arbitration Act clearly require that this Act be interpreted so as to permit and even to encourage the consolidation of arbitration proceedings in proper cases." *Id.* 527 F.2d at 974-75. Consolidation has been deemed to be proper where there are common questions of law or fact and a possibility of conflicting awards or inconsistent results. See *Nereus*, at 974; *Sociedad Anonima*, Slip Opinion at 3; *Matter of Czarnikow*, at 1309. *Accord Conoco Shipping Co.* v. *Norse Shipping Co.* (PTE), 1983 A.M.C. 1146 (S.D.N.Y. 1983). Further, to resist a motion for consolidation of arbitrations, a party must show prejudice that "is sufficiently substantial to outweigh the advantages of resolving the dispute in a consolidated proceeding." *Sociedad Anonima*, 634 F.Supp. at 809 *quoting Insco Lines, Ltd.* v. *Cypromar Navigation Co.*, 1975 A.M.C. 2233, 2235 (S.D.N.Y. 1975); *Vigo S.S. Corp.* v. *Mership Corp. of Monrovia*, 26 N.Y.2d 157, 257 N.E.2d 624, 309 N.Y.S.2d 165, *cert. denied*, 400 U.S. 819 (1970).

In this action, the dispute between Cable Belt and Alpart as well as the dispute between Cable Belt and Paul Howard both center on the same construction project, and a principal issue

in both proceedings is the question of who is responsible for extra costs incurred in the completion of the project. It is clear that numerous questions of law and fact are identical in both disputes.

Further, a resolution of these disputes in separate arbitrations could lead to inconsistent findings. Howard, the subcontractor, has demanded arbitration against Cable Belt to recover damages for the alleged cost of changes, delays and disruptions in the performance of its subcontract with Cable Belt. Cable Belt has denied liability to Howard for its claim as stated but has claimed over against Alpart for such portions of Howard's claims as may be established as justified. A possible result of this arbitration is a finding that Cable Belt must pay Paul Howard certain damages on claims for which Alpart is deemed ultimately responsible. If the arbitrations are not consolidated, Alpart might not be held ultimately liable on those claims since the arbitrator in Cable Belt's arbitration against Alpart would not be bound by the decision of the arbitrator in Howard's arbitration, and may reach a decision which is inconsistent with the other arbitrator. With this in mind, at least one of the reasons why Alpart opposes a consolidated arbitration becomes apparent. With separate arbitration proceedings, Alpart can afford to lose at either one of the proceedings and still totally avoid liability if it prevails at the other.

Alpart has asserted that this Court lacks the authority to consolidate the arbitrations at issue due to the absence of an express provision for a consolidated arbitration in the contract between Cable Belt and Alpart. Alpart has also argued that consolidation would prejudice Alpart because it would force it to defend against Howard's subcontract, portions of which Alpart did not view prior to its execution.

In claiming that this Court cannot compel consolidation absent an express contract provision for consolidation, Alpart relies on *Ore & Chemical Corp.* v. *Stinnes Interoil, Inc.*, 606 F.Supp. 1510 (S.D.N.Y. 1985), *Weyerhauser Co.* v. *Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir. 1984) *cert. denied*,

469 U.S. 1061 (1985) and *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213 (1985). Such reliance, however, is misplaced in light of the decision of the Court of Appeals for the Second Circuit in *Nereus*. As noted by Judge Goettel recently in *Sociedad Anonima*, the holdings in both *Ore & Chemical* and *Weyerhauser* are contrary to the Second Circuit's controlling decision on this issue in *Nereus*, while the Supreme Court decision in *Byrd* does not even address this issue. In commenting on Judge Edelstein's decision in *Ore & Chemical*, Judge Goettel stated as follows:

> . . . [Judge Edelstein] found that consolidated arbitrations could not be compelled absent a provision for consolidation in the parties' agreements. *Id.* at 1514. Judge Edelstein opined that the Second would overrule *Nereus* if it reconsidered that case in light of [*Byrd.*] *Id.* at 1512-13. We respectfully disagree with this speculation.
>
> Unlike Judge Edelstein, we believe that *Nereus* is still good law. The *Byrd* decision never considered whether a district court can compel consolidation. Rather it stressed the congressional intent in passing the Arbitration Act to overcome some courts' reluctance to enforce agreements to arbitrate, *Byrd*, 105 S.Ct. at 1242 and n.6, a problem not present in the instant case. Slip Opinion at 5.

I agree with Judge Goettel's view on this issue. In its decision in *Nereus*, the Second Circuit noted specifically

> that Fed. R. Civ. P., Rules 42(a) and 81(a)(3), are applicable. Moreover, we think the liberal purposes of the Federal Arbitration Act clearly require that this act be interpreted so as to permit and even to encourage the consolidation of arbitration proceedings in proper cases. *Id.* at 975.

Rule 42(a), Fed. R. Civ. P., provides that "when actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." Rule 81(a)(3) provides, in pertinent part, that "in proceedings

under Title 9, U.S.C., relating to arbitration, . . . these rules apply only to the extent that matters of procedure are not provided for in those statutes."

Given the Second Circuit's endorsement of these rules as applying to the issue of consolidation of arbitrations by a federal court, as well as the Second Circuit's clear statement that the liberal purposes of the Federal Arbitration Act "clearly require" that the Act be interpreted "to encourage the consolidation of arbitration proceedings in proper cases," I see no reason to believe that the Second Circuit would alter its position in light of the Supreme Court's decision in *Byrd*, which did not address this issue at all.

Similarly, there is no merit to Alpart's contention that consolidation of the arbitration proceedings would prejudice it since it would have to defend against Howard's subcontract. Alpart would have to defend itself against the same charges in a separate proceeding with Cable Belt as it would in a consolidated proceeding with Cable Belt and Paul Howard. Under either scenario, Alpart would assert and attempt to show that it is not liable to Cable Belt for the damages claimed by Paul Howard, as a result of delays and disruptions on the construction project.

It seems clear that given the circumstances of this case, as well as the controlling case law in this circuit, consolidation is clearly called for in this action. A similar case was recently presented in this district in *Conoco Shipping Company* v. *Norse Shipping Co.*, 1983 A.M.C. 1146 (S.D.N.Y. 1983). In that case, a shipping company and a vessel owner sought to compel the participation of an oil company which had entered into a tanker voyage charter with the owner in a consolidated arbitration involving all three parties. In the dispute with the vessel owner, the oil company claimed that the owner had failed to unload over $50,000 worth of pumpable cargo and deducted this amount from the payments made to the owner for freight. The vessel owner in turn withheld the same amount from the payments due to the shipping company. In the proceeding to

consolidate, the oil company objected to consolidation on the ground that the issues under each charter party were not identical. The court, however, held in favor of the party seeking consolidation, concluding that the existence of common factual issues was sufficient to warrant consolidation. Specifically, the court stated as follows:

> [W]e will concede for purposes of argument that terms of the various charter parties and subcharters are not identical and, consequently, the liability of the several parties to the original claim made by the [oil company] may not be in all respects identical. However, the factual issues giving rise to the claim are identical for all parties involved. The proof of facts to be submitted as to all of the parties is identical. The circumstances surrounding the voyage and the question of whether there was pumpable cargo left aboard and, if so, in what amount, is crucial to all the proceedings. Finally, the ultimate responsibility for the failure to unload all of the cargo is the same factually, if not legally. Rule 42 does not require as a prerequisite in consolidation common questions of law and fact but only common questions of law or fact. The facts here are common . . . It would be foolish to have the same witnesses and documents presented to three separate arbitration panels. Different factual findings could result in inconsistent awards. A consolidated arbitration of all parties is clearly called for. 1983 A.M.C. at 1147.

The analysis in *Conoco* is clearly applicable here. As in Conoco, the factual issues giving rise to both of the disputes at issue here are the same. Moreover, as in *Conoco* a determination of ultimate responsibility under a contract for difficulties arising in connection with the completion of a project is critical to both disputes at issue.

A second argument advanced by Alpart in opposition to this consolidation motion is that, as a jurisdictional matter, this Court lacks the authority to consolidate these arbitrations since a New York State court has already entertained a special proceeding in connection with the Cable-Alpart arbitration and therefore, pursuant to CPLR § 7502(a), all subsequent applications relating to that action must be made before that

court. That special proceeding in New York State Court was by Order to Show Cause signed by Justice Kenneth L. Shorter on February 10, 1986, by which Alpart sought to stay the arbitration demanded by Cable Belt separately on the ground that Cable Belt had failed to comply with certain provisions of the contract which were prerequisites to arbitration. As noted above, Alpart's motion was denied. On appeal, Paul Howard moved for leave to intervene in the state court proceeding on the grounds that it had a right to participate in a consolidated arbitration. Alpart opposed that motion and on August 14, 1986 the motion was denied by the Appellate Division, First Department. All parties to the motion before this Court maintain that this order by the Appellate Division, denying Paul Howard's motion to intervene, is a bar to any further attempts by petitioners to obtain consolidation of the arbitration proceedings in the New York State Court proceeding under the "law of the case" doctrine. Alpart asserts that Cable Belt's sole motive in seeking the present relief before the federal courts is to escape the consequences of an adverse state court decision on the same issue presently before this Court.

CPLR Section 7502(a), which governs state court proceedings relating to arbitration, provides that "[a]ll subsequent applications shall be made by motion in the pending action or the special proceeding." This section does not, however, govern federal proceedings. Moreover, the notion that a federal court is precluded from hearing a petition simply because a related matter was brought in a state court is contrary to standards enunciated by the Supreme Court and applied in this district. As noted by the Supreme Court, the general rule "as between state and federal courts . . . is that the pendency of an action in the state court is no bar to proceedings concerning the same in the federal court having jurisdiction." *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 817 (1976); *Cheeseman* v. *Carey*, 485 F.Supp. 203, 216 (S.D.N.Y. 1980). Indeed, in such situations, dismissal is inappropriate except in three types of "exceptional circumstance":

(1) a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law;

(2) difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; and

(3) the invocation of federal jurisdiction for the purpose of restraining state criminal proceedings. *Colorado River* at 817. This issues in this case do not fall into any of these categories.

Further, as has been noted by the Supreme Court, a federal court's weighing of this type of case must be "with the balance heavily weighted in favor of the exercise of jurisdiction." *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1,16 (1983). In *Americana Fabrics, Inc.* v. *L&L Textiles, Inc.*, 754 F.2d 1524 (9th Cir. 1985), one party brought an action in California state court to stay arbitration, and the other then moved in federal court in the Southern District of New York to compel arbitration. Judge Sofaer enjoined the party opposing arbitration from continuing in the California state court and ordered that the state case be stayed. *Americana Fabrics, Inc.* v. *L&L Textiles, Inc.*, 83 Civ. 5286, Order at 3 (S.D.N.Y. July 18, 1983). On the same day the Judge issued the injunction, the California state court granted the motion to stay arbitration. It entered an order to that effect the next day and affirmed the order two weeks later. *See Americana Fabrics* v. *L&L Textiles*, 754 F.2d at 1524. Three weeks later, notwithstanding the state court's order, Judge Sofaer held that "the parties clearly agreed to arbitrate, and to do so in Los Angeles," but found that a court in the Southern District of New York did not have power to compel arbitration in that district. *Americana Fabrics* v. *L&L Textiles*, 83 Civ. 5286, Memo and Order (S.D.N.Y. Aug. 24, 1983). Despite the state court stay of arbitration, Judge Sofaer held "this Court has the authority, having found an agreement to arbitrate, to stay a state court proceeding until a federal court [in the proper district] can order the parties to proceed [to arbitration]." *Id.*

Pursuant to Judge Sofaer's order, the party seeking arbitration moved to compel in the federal court in California. *See Americana Fabrics* v. *L&L Textiles*, 754 F.2d at 1528. That court dismissed the motion, but the Ninth Circuit reversed, holding that "the SDNY's order, rather than that of the California court, is binding . . ." *Id.*

In *Americana Fabrics* Judge Sofaer took jurisdiction of the case even after the state court had done so. He then ordered that arbitration was required even after the state court had issued a contrary order, and he enjoined further proceedings in the state court. The Ninth Circuit enforced Judge Sofaer's orders rather than the state court's order.

Judge Sofaer ruled in this manner, and the Ninth Circuit affirmed his ruling, despite the fact that California has a statute that is essentially the same as New York's CPLR § 7502. The California statute provides that "after a petition [to compel or stay arbitration] has been filed under this title, the court in which such petition was filed retains jurisdiction to determine any subsequent petition involving the same agreement to arbitrate and the same controversy, and any such subsequent petition shall be filed in the same proceeding." Cal. Civ. Code § 1292.6

In this action, it is not necessary for this Court to take the more severe action ordered by Judge Sofaer and affirmed by the ninth circuit in *Americana Fabrics*. There is no state court decision in this action on the motion currently before the Court as there was in Judge Sofaer's case. Nor is there a need for this Court to stay a state court proceeding. All that is necessary is for the Court to order that the arbitrations be consolidated if such action is proper. Clearly, this Court has the power to do so in light of the ruling by Judge Sofaer and its endorsement by the ninth circuit in *Americana Fabrics*.

Alpart's final contention is that the Court is barred from hearing the petition on the grounds of res judicata. It is well established that the principle of res judicata may not be applied to bar a subsequent action unless there has been a final judg-

ment on the merits of the matter in question. *See, e.g, Herendeen* v. *Champion Int'l Corp.*, 525 F.2d 130, 133 2d Cir. 1975); *Diematic Manufacuring Corp.* v. *Packaging Industries, Inc.*, 412 F.Supp. 1367 (S.D.N.Y. 1976). The matter in question in this case is whether the pending arbitrations involving the parties before the court can and should be consolidated. No court has yet been presented with, much less ruled, on that issue. The New York State Appellate Division's refusal to allow Howard to intervene in the state proceeding cannot be construed as a decision on that issue since Howard was precluded from even addressing the issue before that court. Indeed, Alpart's counsel told the Appellate Division that because the issue of consolidation was never raised in the Supreme Court, "it would be a perversion of the legal process to entertain such issues." (Hughes Aff., Exh. D, Letter of Kalven Kamien to Appellate Division, First Dep't, Aug. 5, 1986). It is difficult to understand how these same attorneys now maintain that the decision of the Appellate Division is res judicata on this issue.

CONCLUSION

For the reasons outlined above, Alpart's motion to dismiss the petition is denied. Petitioner's motion for an order, pursuant to the Federal Arbitration Act (9 U.S.C. § 2 et seq.), and Rules 42(a) and 81(a)(3), Fed. R.Civ.P., to consolidate the arbitration proceedings now pending before the American Arbitration Association between Paul N. Howard Company and Cable Belt Conveyors, Inc. and between Cable Belt Conveyors, Inc. and Alumina Partners of Jamaica is granted.

So ordered.

/s/ William C. Conner
United States District Judge

Dated: New York, New York
March 5, 1987

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. 87-228

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

ALUMINA PARTNERS OF JAMAICA,
Petitioner,

v.

CABLE BELT CONVEYORS, INC.,

and

PAUL N. HOWARD COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENTS' JOINT BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, under the Federal Arbitration Act, courts may order parties to arbitrate in a consolidated proceeding in the absence of language in the underlying arbitration agreements expressly calling for consolidation.

PARTIES TO THE PROCEEDING

Petitioner is Alumina Partners of Jamaica, a Delaware partnership consisting of Kaiser Jamaica Corporation, Reynolds Metals Company, and Alpart Jamaica, Inc. (formerly known as Anaconda Jamaica, Inc.).

Respondents are Cable Belt Conveyors, Inc., a Delaware corporation, and Paul N. Howard Company, a North Carolina corporation. In accordance with Rule 28.1, the Respondents' related companies are listed in Appendix A hereto.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	2
CONCLUSION	7
APPENDIX A	1a
APPENDIX B	3a

TABLE OF AUTHORITIES

Cases	Page
Compania Española de Petroleos, S.A. v. Nereus Shipping, S.A., 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976)	2
County of Sullivan v. Edward L. Nezelek, Inc., 42 N.Y.2d 123, 366 N.E.2d 72, 397 N.Y.S.2d 371 (1977)	7
Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985)	7
Del E. Webb Construction v. Richardson Hospital Authority, No. 86-1570 (5th Cir. Aug. 3, 1987)	2, 5
Gavlik Construction Co. v. H.F. Campbell Co., 526 F.2d 777 (3d Cir. 1975)	4
In Re Vigo Steamship, 26 N.Y.2d 157, 257 N.E.2d 624, 309 N.Y.S.2d 165 (1970)	7
Maxum Foundations, Inc. v. *Salus Corp.*, No. 86-3056 (4th Cir. Mar. 4, 1987)	4, 5
Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983)	7
Perry v. Thomas, —— U.S. ——, 107 S. Ct. 2520 (1987)	4
Scherk v. Alberto-Culver Co., 417 U.S. 506 (1976)	4
Weyerhaeuser Co. v. Western Seas Shipping Co., 743 F.2d 635 (9th Cir.), *cert. denied*, 469 U.S. 1061 (1984)	2, 4, 5
Statute	
Act Feb. 12, 1925, c. 213, 43 Stat. 883	5
Miscellaneous	
AIA Document A201, "General Conditions of the Contract for Construction," 1987 Edition	6
Statement of Internal Operating Procedures, United States Court of Appeals for the Fourth Circuit	5
Wallace, *The Nature and Extent of Intercircuit Conflicts*, 71 Cal. L. Rev. 913 (1983)	6

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RESPONDENTS' JOINT BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case involves claims in arbitration arising out of two contracts providing for the construction of a conveyor system in Jamaica, West Indies. The first is a contract between the owner of the project, Alumina Partners of Jamaica ("Alumina") and the prime contractor, Cable Belt Conveyors, Inc. ("Cable Belt"); the second is a subcontract between Cable Belt and the subcontractor, Paul N. Howard Company ("Howard").

In the arbitration, Howard seeks to recover costs from Cable Belt that it allegedly incurred due to changes to the work. Cable Belt claims against Alumina, *inter alia*, that insofar as it might be liable to Howard for changes that Alumina ordered, Alumina is liable to Cable Belt.

Both the prime contract and the subcontract contained this identical arbitration language:

> *Any and all* questions, disputes or controversies *arising out of or in connection with* the [Contract] [Subcontract], its interpretation, application, performance, non-performance or breach, or any instruments executed and delivered hereunder shall, at the demand of either party hereto, be determined by arbitration in the City of New York, New York [before the American Arbitration Association] . . . .

Joint Appendix filed with the Court of Appeals (hereinafter "J.A.") at 520-21, 532 (emphasis added). Both arbitration clauses further stated: "The parties hereto consent to the jurisdiction of the Courts of the State of New York or the Federal Courts sitting in New York, as appropriate, for all purposes relating to the aforesaid arbitration . . . ." *Id.*

The District Court below ordered consolidation of the arbitrations. The Court of Appeals below affirmed without opinion and unanimously denied Alumina's petition for rehearing and rehearing *en banc*.

REASONS FOR DENYING THE WRIT

Alumina claims principally that the Second Circuit's decisions in this case and in *Compania Española de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976), conflict with the Ninth Circuit's decision in *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir.), *cert. denied*, 469 U.S. 1061 (1984), and the Fifth Circuit's decision in *Del E. Webb Construction v. Richardson Hospital Authority*, No. 86-1570 (5th Cir. Aug. 3, 1987). This case does not, however, present an appro-

priate vehicle for resolving any intercircuit conflict, to the extent that one exists.

There is no circuit conflict where parties have agreed to consolidated arbitrations; in those cases, courts have uniformly ordered that their arbitrations be consolidated. Nor is there any circuit conflict where parties have agreed that their arbitrations should not be consolidated; in those cases, courts have uniformly refused to order consolidation. A circuit conflict can arise only in a case where the parties' intent on the question of consolidation cannot be discerned. In this case, however, and in each of the allegedly conflicting cases, the parties' intent regarding consolidation can be discerned.

In this case, Alumina agreed to arbitrate "[a]ny and all questions, disputes or controversies arising out of or in connection with the Contract . . . ." (J.A. 520.) Alumina also required in the contract that the subcontract between Cable Belt and Howard contain the same terms and conditions as the contract, so far as they were applicable. (J.A. 357.) Moreover, Alumina agreed in the contract to pay Cable Belt for costs incurred by Howard as well as Cable Belt due to changed and additional work.[1] Given similar facts, the Third and Fourth Circuits have both found that the parties implicitly agreed to consolidated arbitrations.[2]

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[1] Contract Exhibit L provides that Alumina shall be liable for costs incurred for changed or additional work, specifically including "Subcontractor's [Howard's] direct cost." (J.A. 317-18). Such costs for changed or additional work comprise the bulk of the claims Cable Belt and Howard assert in the consolidated arbitration.

[2] At page 4 of its petition, Alumina wrongly states that in seeking consolidation, Cable Belt and Howard "were not purporting to enforce any contract terms." Cable Belt and Howard's joint petition to consolidate specifically alleged: "Alumina agreed to consolidation when it entered the Contract, and particularly when it agreed to the Contract's arbitration clause." (J.A. 9-10.) And there is no doubt that the implicit agreement to consolidate is

In *Gavlik Construction Co. v. H.F. Campbell Co.*, 526 F.2d 777 (3d Cir. 1975), the parties each agreed to arbitrate "all disputes arising out of, or relating to," their agreements; the prime contract established the requirements for the subcontractor's performance; and the owner agreed to reimburse the contractor for its subcontractor's costs. 526 F.2d at 788. The Third Circuit concluded, as a matter of simple contract interpretation, that the parties had agreed to a consolidated arbitration. *Id.* at 789.

Similarly, the Fourth Circuit recently ordered consolidation of an owner-contractor-subcontractor dispute like this one based solely on the parties' contracts. In *Maxum Foundations, Inc. v. Salus Corp.*, No. 86-3056, slip op. (4th Cir. March 4, 1987), the court found that the contracts before it were "strikingly similar" to those in *Gavlik*, and thus concluded that the parties had implicitly agreed to consolidate. Slip op. at 3.

By contrast, in *Weyerhaeuser*, while the Ninth Circuit held that a district court could not compel a vessel owner to participate with its charterer and a subcharterer in a consolidated arbitration without its consent, disagreeing with one prong of the Second Circuit's decision in *Nereus*, the Ninth Circuit stated that on the issue of consent, different facts were before the Second Circuit. The Ninth Circuit emphasized that the arbitration agreement in the case before it applied only to disputes between the owner and the charterer, and that the charterer had agreed that any subcharter into which it might enter would have no effect on the owner's obligations. 743 F.2d at 636-37. The court concluded: "It is clear

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enforceable. *See Perry v. Thomas*, —— U.S. ——, 107 S. Ct. 2520, 2527 n.9 (1987) (under the Federal Arbitration Act, courts must construe arbitration agreements in the same manner as they construe nonarbitration agreements under state law); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n.13 (1976) (courts may enforce the implicit agreements of the parties).

that the parties here did not consent to joint arbitration." *Id.* at 637.

Similarly, in *Del E. Webb*, the Fifth Circuit held that consolidation was not available in a case between a building owner, contractor and architect because, as the court put it, their agreement "explicitly exclude[d] the architect from consolidated arbitration." Slip op. at 7. Indeed it did. The parties' agreement stated:

> No arbitration arising out of or relating to the Contract Documents shall include, by consolidation, joinder, or in any other manner, the Architect, his employees or consultants except by written consent containing a specific reference to the Owner-Contractor Agreement and signed by the Architect, the Owner, the Contractor and any other persons sought to be joined.

Id.

Given the parties' implicit agreement to consolidate in this case, there is no need for this Court to resolve any disagreement between circuits on a broad question of a court's power *vel non* to order consolidation absent agreement among the parties. The question of consolidation in this case can be resolved as a routine matter of contract construction, which does not merit this Court's attention. As the Fourth Circuit stated in *Maxum Foundations*, where the parties have implicitly agreed to consolidation, "there is no need to test the limits of the Court's equity power to order consolidation to promote efficiency and prevent inconsistent arbitrations." Slip op at 4.[3]

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[3] In *Maxum Foundations*, the Fourth Circuit declined to have its opinion reported apparently because, according to that court's standards, the case did not involve a "legal issue of continuing public interest." See Statement of Internal Operating Procedures, United States Court of Appeals for the Fourth Circuit 36.3. The Fourth Circuit was right. The Federal Arbitration Act was enacted in 1925. Act Feb. 12, 1925, c. 213, 43 Stat. 883. In the 62

Even if the Second Circuit's decision in this case could not be harmonized with the decisions of other circuits, the conflict would not warrant resolution by this Court. Contracting parties can readily resolve questions of consolidation, like those concerning notice, the selection of arbitrators and other procedural issues relating to arbitration, merely by including an express provision therefor in their contract's arbitration clause. For example, the American Institute of Architects now inserts a reference to consolidation in its standard form contract for the construction industry, the area in which, as Alumina notes, consolidation issues arise most frequently. AIA Document A201, "General Conditions of the Contract for Construction," 1987 Edition, reprinted in part in Appendix B hereto. If such contracts explicitly exclude consolidation, the courts will respect those agreements, as the Fifth Circuit did in *Del E. Webb*. Contracting parties therefore do not need a decision from this Court in order to plan their course of conduct.

Petitioner also overlooks the fact that arbitration clauses almost invariably specify the locale of the arbitration. Thus there is no danger of "forum shopping" to warrant this Court's intervention. The parties select the forum before disputes arise. The decisions of the various circuits are binding only in those circuits, and by naming a city or venue in the agreement, the parties know exactly what court decisions can be applied to their subsequent arbitration. *See generally* Wallace, *The Nature and Extent of Intercircuit Conflicts*, 71 Cal. L. Rev. 913, 929-30 (1983).

Indeed, in its contract, Alumina expressly "consent[ed] to the jurisdiction of the Courts of the State of New York or the Federal Courts sitting in New York, as

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years since, the question of consolidation under the Act has generated only three published decisions by federal courts of appeals: *Nereus*, *Weyerhaeuser*, and *Del E. Webb*. In this case, the Second Circuit did not find it necessary to write an opinion.

appropriate, for all purposes relating to the aforesaid arbitration . . . ." (J.A. 521.) Alumina knew that the courts in New York, both state and federal, could consolidate the arbitrations. The state courts of New York have been consolidating arbitrations at least since 1970, *see In Re Vigo Steamship*, 26 N.Y.2d 157, 257 N.E.2d 624, 309 N.Y.S.2d 165 (1970), and the federal courts in New York have been doing so at least since 1974 when *Nereus* was decided. In fact, in 1977 the New York State Court of Appeals put parties on notice that "parties signing an agreement to arbitrate must be held to do so in contemplation of the announced authority of the courts in proper cases to direct consolidation." *County of Sullivan v. Edward L. Nezelek, Inc.*, 42 N.Y.2d 123, 128, 366 N.E.2d 72, 397 N.Y.S.2d 371 (1977). Alumina should not be heard to complain now that the "consolidation order directly contravened Alumina's agreement to arbitrate . . . ." Petition for a Writ of Certiorari at 10. It did not. When Alumina executed its contract dated 1981, it selected a forum and consented to the jurisdiction of courts where consolidation is routine.

Alumina's subsidiary argument, that the Second Circuit departed from this Court's teachings in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), and *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985), is off the mark. Those cases do not address consolidation. They concern only the obligation of courts to require arbitration where the parties have agreed to arbitrate. In any event, Alumina's argument depends entirely on its incorrect assertion that consolidation "contravenes" or "alters" Alumina's arbitration agreement. As already noted, consolidation in this case does not contravene the parties' agreements; it is supported by the agreements.

CONCLUSION

This case does not present an important conflict worthy of the Court's attention. The decisions below are

consistent with other cases on consolidation, and factual distinctions could account for different results in the different cases. Moreover, the issue of consolidation is a simple procedural one that parties can decide themselves by including appropriate express provisions in their contracts. It is not a significant issue of substantive law. Accordingly, the issue does not merit review in this Court.

For all the foregoing reasons, the Court should deny the petition for writ of certiorari.

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APPENDICES

APPENDIX A

RESPONDENTS' RULE 28.1 STATEMENTS

Cable Belt Conveyors, Inc.

Parent corporation: Laird, Inc.

Paul N. Howard Company

Parent corporation: ITT Corporation

Subsidiary corporations with minority shares outstanding:

Wilton, Sutter and Co.
Steamboat Village Real Estate Corp.
Four Thirty Seven Land Company Inc.
HVA Government Securities Fund, Inc.
Twin City Fire Insurance Company
Gray Harbor Paper Co.
Redshaw, Inc.
Heritage Square Ltd.
Washington Sheraton Corporation
Abbey Life Insurance Company of Canada
The Great Eastern Insurance Company
London-Canada Insurance Company
Southwest Producing Company of Canada Limited
Excess Underwriting Management Singapore (PTE) Ltd.
ITT World Directories Inc.
Promedia SA
ITT World Directories (U.K.) Ltd.
Qume (U.K.) Limited
FLYGT France SA
ISOSTAT S.A. (France)
ITT Composants Et Instruments
Koni France Sarl
Sheraton Hotels France SA
Societe Civile Immobilierer Le Loubet
Societe Civile Immobilierer Principaute Villeneuve
Alfred Teves Metallwarenfabrik GMBH & Co. OHG

Alfred Teves GMBH & Co.
Dittha Deutsche ITT Handelsgellschaft MBH & Co.
Elkose GMBH Elektronik Vertrieb
Hans Werner Liebrich GMBH
ITT Regelungstechnik GMBH & Co. OHG
ITT Regelungstechnik Verwaltungs GMBH
Kolb GMH & Co., OHG
Loewe Pumpenfabrik GMBH
Muenchen Sheraton Hotel GMBH & Co.
Muller & Weigert GMBH
Otto Ramstetter Fabrik Elektrotechnischer
Apparate GMBH
Telcon Versicherung AG
Transatlantische Rueckversicherungs-AG
Transatlantische Sachversicherungs-AG
Golden Pages Ltd.
Cannon Electric Italiana Spa
Isitalia S.P.A.
ITT Grinnell Valves Europe, B.V.
Metalicht, B.V.
Publimedia, B.V.
Zwolsche Algemeene Beleggingen B.V.
Hotels Sheraton De Portugal Sarl
Sociedad Industrial De Electromagnetismo Sarl
SWF Autoelectric SA
Sheraton Hellas E.P.E.
Maister Directories Pty. Ltd.
Sheraton Tunisia Management Corporation
Teleradio Brasileira Ltd.
ITT Communicaciones Mundiales SA (Chile)
Sociedad Immobiliara San Cristobal SA
Cuban American Telephone and Telegraph Company
P.E.A. Industrial S.A. De C.V.
Sistemas De Bombeo SA de CV
Press Wireless Uruguaya Ltda
Cannon/Jae Ltd.
ITT Niles Co. Inc.
Daewoo-ITT Engineered Products Ltd.

APPENDIX B

THE AMERICAN INSTITUTE OF ARCHITECTS

AIA DOCUMENT A201

GENERAL CONDITIONS OF THE CONTRACT
FOR CONSTRUCTION

* * *

1987 EDITION

* * *

This document has been approved and endorsed by the Associated General Contractors of America.

Copyright 1911, 1915, 1918, 1925, 1937, 1951, 1958, 1961, 1963, 1966, 1967, 1970, 1976, ©1987 by The American Institute of Architects, 1735 New York Avenue, N.W., Washington, D.C., 20006.

* * *

ARTICLE 4

ADMINISTRATION OF THE CONTRACT

* * *

4.5 ARBITRATION

* * *

4.5.5 LIMITATION ON CONSOLIDATION OR JOINDER. No arbitration arising out of or relating to the Contract Documents shall include, by consolidation or joinder or in any other manner, the Architect, the Architect's employees or consultants, except by written consent containing specific reference to the Agreement and signed by the Architect, Owner, Contractor and any other person or entity sought to be joined. No arbitration shall include, by consolidation or joinder or in any other manner, parties other than the Owner, Contractor, a separate contractor as described in Article 6 and other persons substantially involved in a common question of fact or law whose presence is required if complete relief is to be accorded in arbitration. No person or entity other than the Owner, Contractor or a separate contractor as described in Article 6 shall be included as an original third party or additional third party to an arbitration whose interest or responsibility is insubstantial. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of a dispute not described therein or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

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On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

---

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
ARGUMENT 1
CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASES:

Compania Espanola de Petroleos, S.A. v. *Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976) 3, 4

County of Sullivan v. *Edward L. Nezelek, Inc.*, 42 N.Y.2d 123, 366 N.E.2d 72 (1977)..... 4

Dean Witter Reynolds Inc. v. *Byrd*, 470 U.S. 213 (1985) 5

Del E. Webb Construction v. *Richardson Hospital Authority*, No. 86-1570 (5th Cir., decided August 3, 1987)..... 3

In re Vigo Steamship, 26 N.Y.2d 157, 257 N.E.2d 624, *cert. denied*, 400 U.S. 819 (1970)..... 4

Moses H. Cone Memorial Hospital v. *Mercury Construction Corp.*, 460 U.S. 1 (1983)..... 5

Southland Corp. v. *Keating*, 465 U.S. 1 (1984)..... 5

Weyerhaeuser Co. v. *Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir.), *cert. denied*, 469 U.S. 1061 (1984)... 3

STATUTES:

Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq*..... 1

LEGISLATIVE HISTORY:

Joint Hearings Before the Subcommittees of the Committees on the Judiciary on S. 1005 and H.R. 646, 68th Cong., 1st Sess. (1924) 5

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PETITIONER'S REPLY BRIEF

In its opening brief, Alumina Partners of Jamaica ("Aluminia") urged the Court to review this case because it presents an issue of federal law on which there is a direct split among three circuits and confusion among the state courts. That issue is whether the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, empowers courts to consolidate separate arbitration proceedings in the absence of the parties' consent.

1. Respondents seek to avoid confronting the question presented here because, in their view, this case "*can*

be resolved as a routine matter of contract construction" (Resp. Br., at 5) (emphasis added). That, however, was not the view of the courts below, which based their decisions entirely on the legal conclusion that the courts have authority under the Federal Arbitration Act to compel consolidation when the parties' contracts do not expressly provide for consolidation.[1] It is this purely legal determination that Alumina seeks to have this Court review.[2]

2. There is nothing to respondents' further suggestion that no conflict on this legal issue exists between the Second Circuit on the one hand, and the Fifth and Ninth Circuits on the other. To be sure, each of these courts of appeals first properly considered whether the parties had contractually addressed the consolidation issue. But that has nothing to do with whether the courts disagree—as

---

[1] The district court's decision, affirmed in a terse opinion by the court of appeals ordering consolidation, was founded on the proposition that consolidation is "proper where there are common questions of law or fact and a possibility of conflicting awards or inconsistent results" (App. 9a).

[2] In any event, there is nothing to respondents' claim that Alumina affirmatively agreed to participate in consolidated arbitration proceedings with subcontractors (Resp. Br., at 3). The contract language relied on by the respondents (Resp. Br., at 2) applied *only* to the arbitration of disputes between Alumina and the contractor. Elsewhere in the contract, the parties expressly precluded "any contractual relationship between [Alumina] and any Subcontractor." (*See* Alumina Pet., at 3 n.1.) Thus, the general contractor, under the contract, could not bind Alumina to any agreement between the general contractor and subcontractor.

Moreover, the contract specifically provided that the parties would be governed by the rules of the American Arbitration Association, which took the position that "in the absence of the consent of Alumina Partners of Jamaica, the Association is without authority to consolidate . . . ." Jt. App. filed with Court of Appeals, at A238.

they do—about the legal issue presented when they determine that the parties have not agreed to consolidation. The split in authority among the circuits arises because some judges insert into the contracts consolidation provisions that parties did not agree upon and do so on the basis of the Federal Arbitration Act, despite the fact that Congress gave the courts no such power.

In this case and in *Compania Espanola de Petroleos, S.A.* v. *Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976), the Second Circuit held that consolidation may be ordered even in the absence of affirmative consent, while the Ninth Circuit disagreed in *Weyerhaeuser Co.* v. *Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir.), *cert. denied*, 469 U.S. 1061 (1984).[3] In *Del E. Webb Construction* v. *Richardson Hospital Authority*, No. 86-1570 (5th Cir. Aug. 3, 1987), the Fifth Circuit considered both views and "agree[d] with the Ninth Circuit that under § 4 of the Federal Arbitration Act the sole question for the district court is whether there is a written agreement among the parties providing for consolidated arbitration." That is as clear a conflict on the law as can be imagined.

3. Respondents also argue that this case does not present a "significant issue of substantive law" because in the future parties may guard against what petitioner believes is judicial overreaching by inserting explicit provisions in their contracts flatly prohibiting consolidation. (Resp. Br., at 6, 8.) But the federal and state courts

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[3] In *Weyerhaeuser*, the court held that "[i]nsofar as [*Nereus*] holds that federal courts may order consolidation in the absence of consent, we decline to follow it." 743 F.2d at 637. The respondents necessarily concede that *Weyerhaeuser* disagreed with this extra-contractual "prong of the Second Circuit's decision in *Nereus*." (Resp. Br., at 4.)

must deal in reality, and must decide the many actual cases in which the contracts do not contain such provisions. The recurring nature of such disputes concerning consolidation is amply demonstrated by the substantial number of state and federal courts (many of which are listed in Alumina's petition) that have confronted the issue since the Second Circuit's 1975 decision in *Nereus*.

It is no answer to say, as respondents do, that it is tolerable for different interpretations of federal law regarding consolidation to prevail in different circuits because parties may choose between the circuits (and their different consolidation rules) when they agree to the venue of arbitration proceedings.[4] As this Court has

[4] Respondents assert that when Alumina entered into its contract with the general contractor in 1981 "the courts in New York . . . could consolidate the arbitrations." (Resp. Br., at 7.) The courts below did not rule on that question because it has no bearing on this case. In any event, in 1981, it was not at all certain that the holding of *Nereus*, involving consolidation of arbitrations among three parties *with* contractual privity, would be applied to parties (such as Alumina and the subcontractor) with no contractual privity. The district courts in the Second Circuit later split on the question of *Nereus*' validity, and this is the first case in which the Second Circuit has applied the *Nereus* rule broadly. The New York state court case chiefly relied upon by respondents, *County of Sullivan* v. *Edward L. Nezelek, Inc.*, 42 N.Y.2d 123, 366 N.E.2d 72 (1977), was decided under state law, and thus had no relevance to Alumina's arbitration agreement, and the other state court decision cited by respondents pointedly noted the "lack of apposite case law" on the question whether consolidation could be ordered under the Federal Arbitration Act. *In re Vigo Steamship*, 26 N.Y.2d 157, 257 N.E.2d 624, 627, *cert. denied*, 400 U.S. 819 (1970).

Finally, we note that the American Arbitration Association found that there was an "absence of consent" by Alumina to consolidated arbitration proceedings (note 2, *supra*), and the courts below never determined that Alumina had "consented" to consolidation by agreeing to arbitrate disputes in New York. It was that lack of consent that prompted the district court's consideration of whether it had authority under the Federal Arbitration Act to order consolidation.

emphasized with respect to the applicability of the Federal Arbitration Act in the state courts, Congress did not intend "to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted." *Southland Corp.* v. *Keating*, 465 U.S. 1, 15 (1984). The principle is all the more compelling with respect to the federal courts of appeals. This Court alone can ensure that Congress' goal of a nationally-uniform federal arbitration law is not frustrated through inter-circuit conflicts.[5]

4. Respondents say little about Alumina's contention that the courts below erred in ordering consolidation on efficiency-based grounds when the parties had never agreed to consolidation. It is not enough for respondents to assert that *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983), and *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213 (1985), "do not address consolidation" (Resp. Br., at 7). It is the principle of those decisions that governs this case—namely, that the courts may not expand or constrict a party's contractual obligation to arbitrate disputes on the basis that this might promote judicial notions of efficiency. The courts below, like respondents, ignored that principle and in doing so, set themselves at odds with the decisions of this Court and of the other courts of appeals that have ruled upon the question.

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[5] The advantages of a uniform federal arbitration statute were stressed in the hearings leading to the enactment of the Federal Arbitration Act. *See* Joint Hearings Before the Subcommittees of the Committees on the Judiciary on S. 1005 and H.R. 646, 68th Cong., 1st Sess. 28 (1924) (Statement of Mr. Alexander Rose, representing the Arbitration Society of America).

CONCLUSION

For the reasons stated above and in Alumina's petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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